

In The Matter Of:
GILEAD SCIENCES, INC. et al v
TEVA PHARMACEUTICALS USA INC.

August 29, 2013

SOUTHERN DISTRICT REPORTERS
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<p>D8tQgilC Page 1</p> <p>1 UNITED STATES DISTRICT COURT 2 SOUTHERN DISTRICT OF NEW YORK 3 -----x 4 GILEAD SCIENCES, INC. et al 5 Plaintiffs 6 v. 10 CV 1796 (RJS) 7 TEVA PHARMACEUTICALS USA INC. 8 et al Defendants 9 -----x 10 New York, N.Y. 11 August 29, 2013 12 2:45 p.m. 13 Before: 14 HON. RICHARD J. SULLIVAN 15 District Judge 16 APPEARANCES 17 FITZPATRICK CELLA HARPER & SCINTO 18 Attorneys for Plaintiffs 19 NICHOLAS M. CANNELLA 20 KENYON & KENYON 21 Attorneys for Defendant Teva 22 JAMES WRIGHT GALBRAITH 23 GOODWIN PROCTER LLP 24 Attorneys for Defendant Teva 25 DAVID M. HASHMALL</p>	<p>D8tQgilC Page 3</p> <p>1 MR. CANNELLA: Your Honor, Mr. Cannella. 2 THE COURT: Yes. 3 MR. CANNELLA: I will attempt to make the journey down 4 memory lane a short one. You are correct the parties announced 5 to you that we had reached an agreement in principle. You are 6 also correct that subsequent to that time, we did in fact 7 reduce the agreement in principle to writing. Your Honor may 8 also recall that we are required by statute to submit that type 9 of an agreement to both the Department of Justice and the 10 Federal Trade Commission for review. 11 We asked your Honor to dismiss 90 days down the road 12 to give the FTC and the Department of Justice some time to 13 review it. We subsequently heard, I believe on the day before 14 the 90-day period was to expire, that the Federal Trade 15 Commission had a "concern" over one of the provisions in the 16 agreement. We so notified your Honor in writing and asked for 17 an extension of time. Both parties subsequently have 18 communicated with the Federal Trade Commission in an attempt to 19 dissuade it of its purported concern. Those efforts proved 20 unsuccessful, and the Commission reiterated its concern over 21 just one provision in the agreement. 22 Fortunately, for all concerned, your Honor, as of late 23 yesterday afternoon, the parties have determined that they will 24 drop the "offending" provision from the agreement. So we 25 simply now have to prepare and execute a simple amendment to</p>
<p>D8tQgilC Page 2</p> <p>1 (In chambers) 2 THE COURT: Hello counsel? 3 MR. CANNELLA: Yes. 4 THE COURT: Hi. 5 MR. CANNELLA: Good afternoon, your Honor. 6 THE COURT: Let me just take appearances to let me 7 know who is here. For the plaintiff? 8 MR. CANNELLA: Nick Cannella, your Honor. 9 THE COURT: Mr. Cannella, good afternoon. 10 For the defendant? 11 MR. GALBRAITH: Jim Galbraith, your Honor. 12 MR. HASHMALL: And David Hashmall, your Honor, Goodwin 13 Procter. 14 THE COURT: That's all? 15 MR. CANNELLA: It is, your Honor. 16 THE COURT: I'm here with the court reporter. So if I 17 could ask each of you to identify yourselves each time we speak 18 so we could make sure we have the correct voice attributions on 19 the transcript. 20 This is a trip down memory lane, I think, or at least 21 I thought we settled this thing. You guys were working out the 22 fine print in details, but I guess the last correspondence I 23 got from you indicated that there might be some things worth 24 talking about. 25 So, where are we? What's going on?</p>	<p>D8tQgilC Page 4</p> <p>1 the underlying settlement agreement, send that down to the 2 Federal Trade Commission, and then your Honor will be able to 3 dismiss the case. 4 THE COURT: OK. 5 MR. CANNELLA: We firmly believe that there are no 6 hurdles left. In candor, we did not see this original 7 agreement as having any difficulty, but since the Commission 8 has raised its concern with respect to only one provision, and 9 we are now eliminating that provision, we have the greatest 10 confidence that we are, once we sign the amendment in the 11 ministerial phase, which is just giving it to the Commission 12 and then we will notify your Honor promptly that we have done 13 that, and you can dismiss the case. 14 We expect all of that will happen well before the 15 October 1 date that your Honor has given us to try to get this 16 all resolved, and we will let you know as soon as it does. 17 THE COURT: OK. That sounds pretty good. Maybe the 18 upside is I don't have to do a darn thing. All right. 19 Do you mind my asking what is the offending provision? 20 MR. CANNELLA: Not at all, your Honor. Just a little 21 bit of background, if I may. The Federal Trade Commission has 22 historically taken issue with settlements between brand 23 companies and generics when those settlements have what are 24 called reverse payments in them where the brand name company 25 pays a sum of money to the generic company, allegedly in</p>

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1 exchange for the generic company's agreement to stay off the
2 market longer than the generic company might otherwise have
3 done so.

4 Not too long ago, your Honor may be aware, the Supreme
5 Court addressed such provisions in a very split court
6 five-three and they found that the such provisions could
7 potentially violate the antitrust laws that had to be evaluated
8 under the rule of reason. That has emboldened the FTC and has
9 breathed new life into its enforcement efforts.

10 So now they have reached out in our agreement, and, as
11 I understand it, in some others, to challenge the agreements
12 even though there is no reverse payment provision. No money
13 was to change hands under our agreement. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

21 That song, quite
22 frankly, has never had too many folks singing in its choir.

23 Every court that has addressed it in the past has
24 rejected the argument, but they have raised the argument in
25 connection with our settlement. The parties here were not
looking to trade one lawsuit for another lawsuit.

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1 THE COURT: Right.

2 MR. CANNELLA: We don't want to fight the FTC even
3 though we were confident we were correct. So if we could not
4 resolve it, we would go back and fight a patent case.

5 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

10 THE COURT: That's interesting. Thanks for letting me
11 know. I expect to hear on or before October 1st from you, and
12 hopefully it goes according to plan. If there is an additional
13 hiccup, let me know. Anything else I should do or be thinking
14 about now?

15 MR. CANNELLA: Not from plaintiff's perspective, your
16 Honor.

17 MR. GALBRAITH: No, your Honor, not from defendants.

18 THE COURT: OK. Great. If you want a copy of the
19 transcript, you can contact the court reporters' office, but,
20 otherwise, I guess I'll wait till I hear from you. Enjoy the
21 rest of the summer.

22 MR. GALBRAITH: Thank you, your Honor. Thank you for
23 your time.

24 THE COURT: Thanks for cluing me in. Take care.
25 (Adjourned)

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